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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	A1505014

OPENING ISSUE BRIEF

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Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	Application No. 15-05-014

OPENING ISSUE BRIEF

In accordance with the Schedule set in the Scoping Memo, James L. Duncan (Duncan), a party in this proceeding, A1505014, respectfully submits this Opening Issue Brief.

It is erroneous to assert that the ruling in *Santa Clara Valley Transportation Authority v Public Utilities Commission* limiting the scope of CPUC jurisdiction is inapplicable because of the existing freight train traffic at the Jennings Avenue rail crossing: CPUC decisions establish that there was also existing freight train traffic at the rail crossing which was in dispute in the *Santa Clara Valley Transportation Authority* case.

The arguments of the Safety and Enforcement Division (SED)[1] and the City of Santa Rosa (City)[2] have focused on the North Coast Railroad Authority (NCRA) freight train traffic on the right of way of the Sonoma Marin Area Rail Transit district (SMART). In *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346 (*Santa Clara*) the court held that the statutory authority of the CPUC in legislatively created transit districts, such as SMART, is the limited jurisdiction granted by Public Utilities Code § 99152[3]. SED and the City have asserted[4] or implied[5] that *Santa Clara* is distinguishable and consequently inapplicable because of the NCRA freight train traffic on the SMART right of way.

[1] Protest of the Safety and Enforcement Division, June 4, 2015, p. 1, footnote 1.
[2] Opening Brief of the City of Santa Rosa Regarding Commission Jurisdiction, Dec. 28, 2015, pp. 4-5.
[3] *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* (2004) 124 Cal. App. 4th 346, 365.
[4] Rebuttal Brief of the City of Santa Rosa Regarding Commission Jurisdiction, January 14, 2016, pp. 3-4.
[5] Concurrent Rebuttal Brief of the Safety and Enforcement Division on Issue #5: The Commission's Safety Jurisdiction Over the Jennings Avenue At-Grade Crossing pursuant to *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California*, p. 8.

The *Santa Clara* court's opinion does not discuss existing freight train traffic on the Santa Clara Valley Transportation Authority (VTA) right of way and through the disputed crossing, but that is not because there was none. The CPUC's own Decisions associated with the VTA's Vasona Light Rail Project and records in the U. S. DOT Crossing Inventory establish that in fact there was existing freight train traffic which the *Santa Clara* court could have considered.

The factual backgrounds of the disputed rail crossing in *Santa Clara* and the Jennings Avenue crossing in the City's present application are substantially similar. The disputed VTA crossing in *Santa Clara* was the Hamilton Avenue crossing in the City of Campbell.[6] The VTA's disputed application was for approval for the Vasona Light Rail Project of a second track through the existing Hamilton crossing on the existing VTA right of way. Both the Hamilton crossing and the Jennings crossing had been officially approved and in existence for years before the disputed applications were filed. In 1970, the Hamilton crossing was originally listed on the U. S. DOT Crossing Inventory as a new crossing.[7] In 1904, Jennings Avenue – designated as a full two-lane road, complete with rail crossing – was accepted and dedicated to public use by the Sonoma County Board of Supervisors. Until 1961, Jennings Avenue remained in use as a county road, still with a rail crossing. In late 1961, acting on a condition dictated by a subsidiary of the Southern Pacific Company, the Board of Supervisors took initial steps to close the Jennings crossing in exchange for assurance that the railroad company would not oppose the creation of a new rail crossing at Guerneville Road. The CPUC crossing number for the Jennings crossing was No. 5-55.0. At an undetermined date in the early 1960's, barriers to motor vehicles were installed at the crossing, but the crossing remained open until 2015, to pedestrian and bicycle use, even while trains were still in operation on the rail line. Extensive public records search has not located record of any final action by the Board of Supervisors vacating the 1904 public right of way; consequently, in the absence of any evidence to the contrary, the 1904 official Jennings crossing public right-of-way is still in effect.[8]

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[6] *Santa Clara*, *supra*, 124 Cal. App. 4th at p. 351.
[7] Hamilton Avenue, Campbell, California, highway-rail at-grade rail crossing, FRA # 750165S, U. S. DOT Crossing Inventory Form, dated January 1, 1970, as new crossing. http://safetydata.fra.dot.gov/officeofsafety/publicsite/crossing/crossing.aspx [as of April 14, 2016] (To access the specific FRA report, select History, enter Crossing #750165S, and click Generate Report.)
[8] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, Exhibit C, Jennings Ave., History.

The Hamilton crossing[9] and the Jennings crossing[10] both had a history of freight train traffic before the disputed applications to CPUC were filed, and there is currently freight train traffic through both crossings[11, 12]. The freight train traffic through the Hamilton crossing is operated by the Union Pacific Railroad Company, a private company, on tracks owned by the VTA, a transit district.[13] The freight train traffic through the Jennings crossing is operated by the NCRA, a public agency, on tracks owned by SMART, a transit district.[14]

CPUC Decisions establish that the CPUC was well aware of the existing freight train traffic throughout the Hamilton crossing jurisdictional dispute.[15] If the CPUC had considered that to be legally relevant in any way it could have brought that to the attention of the *Santa Clara* court. The CPUC, however, did not raise any issue related to the existing freight train traffic at the Hamilton crossing in its own proceeding, nor in the *Santa Clara* court's review, nor in the CPUC's subsequent Petition For Review in the California Supreme Court. In any case, it would have been pointless for the CPUC to have argued that the Union Pacific Railroad Company freight train traffic through the Hamilton crossing was legally relevant; the overarching issue in *Santa Clara* and in this proceeding is the scope of the CPUC's statutory authority over crossings in transit districts, which are legislatively created public agencies.

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[9] Hamilton Avenue, Campbell, California, highway-rail at-grade rail crossing, FRA # 750165S U. S. DOT Crossing Inventory Form, dated January 1, 1970, as new crossing, indicates Southern Pacific Transportation Company freight train traffic at crossing. http://safetydata.fra.dot.gov/officeofsafety/publicsite/crossing/crossing.aspx [as of April 14, 2016] (To access the specific FRA report, select History, enter Crossing #750165S, and click Generate Report.)

[10] Northwestern Pacific Railroad, pp. 1, 5, https://en.wikipedia.org/wiki/Northwestern_Pacific_Railroad

[11] Hamilton Avenue, Campbell, California, highway-rail at-grade rail crossing, FRA # 750165S, U. S. DOT Crossing Inventory Form, April 11, 2012, indicates Union Pacific Railroad Company freight train traffic at crossing. http://safetydata.fra.dot.gov/officeofsafety/publicsite/crossing/crossing.aspx [as of April 14, 2016] (To access the specific FRA report, select History, enter Crossing #750165S, and click Generate Report.)

[12] SMART White Paper No. 14, July 2008. www2http.sonomamarintrain.org/userfiles/file/14_whitepaper_freight.pdf [as of April 14, 2016]

[13] CPUC Decision 03-06062, June 19, 2003, see first full paragraph at top of page 4.

[14] See footnote 12, above.

[15] CPUC Decision 02-12-053, December 12, 2002, p. 4, "The crossing also is used by Union Pacific Railroad freight trains which make three roundtrips per week." Also see CPUC Decision 03-05-026, May 8, 2003, pp. 1, 3. Also see CPUC Decision 03-06-062, June 19, 2003, pp. 1. 3, 4.

The California Supreme Court has now reaffirmed that the CPUC has no authority to regulate public agencies absent express statutory authorization.

On January 25, 2016, the California Supreme Court issued its decision in *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California*, (2016) 62 Cal.4th 693 (*Monterey Peninsula Water*). "The last time the court spoke on the scope of the CPUC's jurisdiction—in 1995—it ruled that the CPUC's otherwise broad authority does not allow it to ignore express statutory directives or other clear restrictions on its authority. *Assembly v. Public Utilities Commission* (1995) [12 Cal.4th 87] at 103–104."[16] In ruling in *Monterey Peninsula Water* that the CPUC did not have authority to review the amount of the fees of the water management district, a public agency, the Supreme Court reaffirmed its holding in *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154 (*Monterey Peninsula Water*, *supra*, at p. 698.):

> Created by the California Constitution, the Public Utilities Commission has exclusive jurisdiction to supervise and regulate public utilities. (Pub. Util. Code, §§ 701-853, 1001, 1002, 2101.) It has no authority, however, to regulate public agencies like the [Water Management] District, absent a statute expressly authorizing such regulation. (See *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 166-167 (*County of Inyo*).)

In *Monterey Peninsula Water*, the CPUC argued that § 451 authorized it to "review the amount of any third party charge that appears on a public utility bill, no matter whether the public utility originates the charge or receives the funds that are collected."[17] The CPUC's argument relied "primarily on the reference to the reasonableness of '[a]ll charges demanded or received by [a] public utility.' (§ 451.)" The Supreme Court reemphasized: "statutory language cannot be read in isolation; like all language, statutory language takes its meaning from the context in which it appears." Read in the context of § 451 rather than as an isolated phrase, the "charges" were "for any product or commodity furnished ... or any service rendered" originated by the public utility itself and were "not the charges of public agencies or other third parties".

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[16] Opinion Analysis: Monterey Peninsula Water Management District v. California Public Utilities Commission, SCOCAblog, Megan Somogyi, January 27, 2016, http://scocablog.com/opinion-analysis-monterey-peninsula-water-management-district-v-california-public-utilities-commission [April 14, 2016].

[17] *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California*, (2016) 62 Cal.4th 693, 698 (*Monterey Peninsula Water*)

The California Supreme Court continued, "[b]ut even if a contrary reading of section 451 were otherwise tenable, the argument would fail because nothing in section 451 provides the PUC with the necessary 'express[]' authorization to regulate the activities of public agencies like the District. (*County of Inyo, supra,* 26 Cal.3d at p. 166.) Indeed, section 451 does not mention the PUC at all; it simply provides that the charges of a public utility must be 'just and reasonable.'"[18] The CPUC's authority to enforce the "just and reasonable standard" for public utilities charges is derived from the CPUC's constitutional authority over public utility rates and not from § 451. The California Constitution does not grant the CPUC authority over public agency fees nor does § 451. The Supreme Court concluded that the CPUC's interpretation of § 451, "would dramatically expand the Commission's powers in a manner the Legislature could not have intended."[19]

The ruling of the *Santa Clara* court, cited extensively in this proceeding, that Public Utilities Code §§ 1201 and 1202[20] do not apply to transit districts, such as the VTA and SMART, is also based on the Supreme Court's holding in *County of Inyo* (*Santa Clara*, *supra*, at p. 356):

> As our Supreme Court has recognized, "[e]stablished doctrine declares that, 'In the absence of legislation otherwise providing, the [PUC's] jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities.' (*Los Angeles Met. Transit Authority v. Public Utilities Com.* (1959) 52 Cal.2d 655, 661.) The Court of Appeal noted the same principle in *People* ex rel. *Pub. Util. Com. v. City of Fresno* [(1967)] 254 Cal.App.2d 76, 81. We reiterated in *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, 953 at footnote 7, that 'The [PUC] has no jurisdiction over municipally owned utilities unless expressly provided by statute.' Significantly, when the Legislature first granted the PUC regulatory authority over the Los Angeles Metropolitan Transit Authority, it enacted such a specific statute (Stats. 1951, ch. 1668, p. 3804), and observed that in so doing it 'has made exceptions to a long established policy. . . .' (Stats. 1951, ch. 1668, § 13.4.)" (*County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 166.)

As discussed previously, an argument substantially similar to that made by the CPUC in *Monterey Peninsula Water* has been made in this proceeding, i.e., that the general definition of "Railroad" given in § 229 provides an indirect restoration of the CPUC's §§ 1201and 1202

[18] *Monterey Peninsula Water*, *supra*, p. 699.

[19] *Monterey Peninsula Water*, *supra*, p. 699-700.

[20] All following citations will be to the Public Utilities Code unless specified otherwise.

jurisdiction over the Jennings crossing because the NCRA, which is asserted to be a § 229 "Railroad", has an easement to run its freight trains on the SMART right of way and contracts with a private entity to operate its trains.[21] A variant of this argument has also been made, that SMART itself is a "Railroad" as defined by § 229 and thus the CPUC's §§ 1201and 1202 jurisdiction over the Jennings crossing is also indirectly restored.[22] Even if SMART, the NCRA, or its contracted operator were a "Railroad" as defined by§ 229, it would have no relevance because, like § 451 in *Monterey Peninsula Water*, "nothing in section [229] provides the PUC with the necessary 'express[]' authorization to regulate the activities of public agencies" such as SMART, the NCRA, the VTA or any legislatively created public agency. "Indeed, section [229] does not mention the PUC at all; it simply provides" a general definition of "Railroad".

In *Monterey Peninsula Water*, the CPUC also made a narrower argument to justify its assertion of jurisdiction over the water district's fees. The CPUC claimed that the water district was acting as an agent for the public utility because the water district's fees funded mitigation work that the public utility had a legal obligation to perform. However, the public utility's legal obligation to continue the mitigation work was contingent on the water district discontinuing the mitigation work, which it had not done. Additionally, the water district had an independent interest in the mitigation work and legal authority to levy and collect revenue to fund it.[23] To the extent that a comparable implicit argument has been made in this proceeding–i.e., that CPUC jurisdiction over SMART is justified because SMART is an agent for the NCRA or its contracted private operator, or that the NCRA is an agent for its contracted private operator–that argument would be erroneous.

As discussed previously, SMART and the NCRA are required by statute to work together to "achieve safe, efficient, and compatible operations of both passenger rail and freight service along the [SMART] rail line ... ."[24] Beyond that statutory directive, however, there is no statutory authorization or relationship in which SMART provides freight train service itself or provides

[21] James L. Duncan - Reply Brief on Jurisdictional Issues, January 11, 2016, p. 7-9.

[22] James L. Duncan - Rebuttal Brief on Jurisdictional Issues, January 14, 2016, p. 3.

[23] *Monterey Peninsula Water*, *supra*, p. 700-701.

[24] James L. Duncan - Opening Brief on Jurisdictional Issues, December 28, 2015, p. 4.

customers for the NCRA's freight train service, nor in which the NCRA provides passenger rail service itself in the SMART right of way or provides riders for SMART. The NCRA is authorized by statute to select a public or private entity to operate a rail transportation system[25] but that public or private entity has no status to operate freight or passenger train service independent of the public agency governance of the NCRA or of SMART.

In this proceeding, the City[26] and SED[27] have asserted that §§ 1201-1202 and § 99152 are either functionally identical or are concurrent in effect. In *Monterey Peninsula Water*, discussed above, the California Supreme Court's holdings both on the requirement for express statutory provision of CPUC jurisdiction over public agencies as well as on the interpretation of statutory language in the context of statues provide guidance to rebut these assertions. Although §§ 1201 and 1202 are "broadly worded grants of power to the [C]PUC over railroad crossings in general"[28] which provide exclusive discretionary jurisdiction in privately owned railroads and specifically over "protections" at crossings,[29] they do not provide the CPUC with express jurisdiction over rail crossings in transit districts,[30] and § 99152 expressly grants the CPUC only limited ministerial jurisdiction over "safety appliances and procedures" at rail crossings in public transit districts but not rail crossings in privately owned railroads.[31] If §§ 1201 and 1202 were actually applicable to rail crossings in public transit districts there would not have been any necessity for the Legislature to have enacted § 99152. The Legislature cannot be presumed to have performed idle acts when enacting legislation.[32]

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[25] Government Code § 93020(f).

[26] Rebuttal Brief of the City of Santa Rosa Regarding Commission Jurisdiction, January 14, 2016, pp. 2-3.

[27] Concurrent Rebuttal Brief of the Safety and Enforcement Division on Issue #5: The Commission's Safety Jurisdiction Over the Jennings Avenue At-Grade Crossing pursuant to *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California*, p. 8.

[28] *Santa Clara*, *supra*, 124 Cal. App. 4th at p. 351.

[29] § 1202 (a).

[30] *Santa Clara*, *supra*, 124 Cal. App. 4th at p. 365.

[31] *Santa Clara*, *supra*, 124 Cal. App. 4th at p. 358, also see p. 365.

[32] *Jack Shoemaker v. Beverlee A. Myers* (1990) 52 Cal.3d 1, 22.

SED reiterates arguments[33] which had been raised previously in the Decision in *Santa Clara.*[34] The gist of these arguments is that the 1986 amendment to § 99152[35] granted the CPUC an open ended authority identical to that of §§ 1201 and 1202. These arguments were rejected in *Santa Clara*. Moreover, the holding in *Monterey Peninsula Water* that statutory language cannot be read in isolation and must be read in the context in which it appears, establishes that the amendment to § 99152 is limited to "safety appliances and procedures". It must be concluded that the Legislature intended § 99152 and its 1986 amendment to provide the CPUC ministerial jurisdiction only over "safety appliances and procedures" at transit district rail crossings.

For the reasons set forth above, James L. Duncan respectfully urges the Commission to issue a Decision in this proceeding approving the City of Santa Rosa's Application, A1505014, consistent with *Santa Clara Valley Transportation Authority v Public Utilities Commission of the State of California* 124 Cal. App. 4th 346 (2004), *Monterey Peninsula Water Management District v Public Utilities Commission of the State of California* (2016) 62 Cal.4th 693, other authorities cited, and argument submitted in this proceeding by James L. Duncan.

Dated this 15th day of April, 2016, at Santa Rosa, California.

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[33] Concurrent Rebuttal Brief of the Safety and Enforcement Division on Issue #5: The Commission's Safety Jurisdiction Over the Jennings Avenue At-Grade Crossing pursuant to *Santa Clara Valley Transportation Authority v. Public Utilities Commission of the State of California*, p. 8.

[34] Decision 02-12-053, December 17, 2002, pp. 15-20.

[35] *Santa Clara*, *supra*, 124 Cal. App. 4th at p. 358.